

**CAROLINE BANNON**  
Claimant

**LIGGETT GROUP**

Respondent

**ROYAL INSURANCE COMPANY OF AMERICA**  
Insurance Carrier

Docket No. 198,280

Respondent requests review by the Appeals Board of a Preliminary Hearing Order entered by Administrative Law Judge John D. Clark on April 11, 1995 that granted claimant's request for compensation benefits.

Respondent questions the Administrative Law Judge's Preliminary Hearing Order raising the following issues:

- (1) Whether claimant sustained a personal injury by accident arising out of and in the course of her employment with the respondent on the dates alleged;
- (2) Whether claimant gave timely notice of her accident;
- (3) Whether the Administrative Law Judge exceeded his authority in ordering all medical paid; and,
- (4) Whether the Administrative Law Judge exceeded his authority in ordering temporary total disability benefits.

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The first two issues raised by the respondent in this appeal are jurisdictional and subject to Appeals Board review. See K.S.A. 44-534a(a)(2).

- (1) The Appeals Board will first review the preliminary hearing evidentiary record concerning the issue of whether the claimant sustained a personal injury by accident while employed by the respondent on the dates alleged. In a workers compensation case, it is the claimant's responsibility to persuade the trier of fact by a preponderance of the credible evidence that she is entitled to the compensation benefits requested. See K.S.A. 44-501(a) and K.S.A. 44-508(g).

In the case at hand, the claimant claims an injury to her low back while working for the respondent from October 4, 1994 through January 6, 1995. Claimant alleges she first injured her back on October 4, 1994 when she picked up cases of old cigarettes which weighed approximately sixty (60) pounds or more from a wholesaler. After that injury, she continued to work and first sought medical treatment from Dr. Robert Eyster on October 18, 1994. Claimant asserts that she told her supervisor, Larry Wells, on October 18, 1994, that she hurt her back at work and needed medical treatment. Claimant also testified that the respondent did not refer her to Dr. Eyster and that she never requested that the respondent pay for the medical treatment.

Claimant was under Dr. Eyster's care and worked for the respondent until January 6, 1995. At that time she was terminated by the respondent because Dr. Eyster placed a lifting restriction on her of twenty (20) pounds. Claimant also alleged that she had an increase in her symptoms in her back during another incident of lifting cigarette cases at work just before Christmas in December of 1994.

Dr. Eyster's medical records indicate that the history that the claimant gave during her first visit, October 18, 1994, stated that she had left hip pain for approximately four (4) months. Dr. Eyster also recorded that the patient appears to have sciatica which has been going on for a year. Dr. Eyster was still treating the claimant on the date of the preliminary hearing, April 4, 1995, and his medical records do not relate claimant's low back condition to her work. In fact, a statement signed by Dr. Eyster at the respondent's request in reference to disability benefits states that the claimant's sickness or injury did not arise out of patient's employment.

The medical records of claimant's family physician, Dr. Frank Kutilek III, were also made a part of the preliminary hearing record. These records indicate that as far back as October 4, 1993, claimant was treated for low back pain. Dr. Kutilek adjusted claimant's back and diagnosed sciatica as recently as July 25, 1994. A few days prior to claimant's alleged work-related injury of October 4, 1994, claimant had a back adjustment from Dr. Kutilek on September 23, 1994.

An affidavit was entered into evidence by the respondent from Larry Wells, who was the area manager for the respondent and claimant's supervisor until January 3, 1995. In that affidavit, Mr. Wells specifically denies that claimant ever told him she injured her back while working for the respondent.

During the preliminary hearing, claimant specifically testified that she did not have back pain prior to October 4, 1994. She further testified that she does not recall giving Dr. Eyster's office a history that she had had left hip pain for approximately four (4) months. Claimant further denied that she told Dr. Eyster that her pain had been going on for over a year. When asked whether she had been seen by Dr. Kutilek, her family physician for her back, she replied "No, I haven't."

After a careful review of the testimony of the claimant, affidavits presented by the respondent and the medical records admitted into evidence for preliminary hearing purposes, the Appeals Board finds that the claimant has failed to present credible evidence that she sustained an accidental injury while employed by the respondent. The medical records indicate that she had been treated for low back problems for over a year prior to her alleged accident of October 4, 1994. The Appeals Board questions the credibility of the claimant and finds that it is more probably true than not that her present low back complaints are a continuation of her low back condition that had been occurring for over a year prior to her alleged work-related injury and are not the result of an accidental injury which occurred while working for the respondent.

Having found that the claimant did not sustain a work-related injury while employed by the respondent, the remaining issues are moot and will not be addressed by the Appeals Board.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge John D. Clark, dated April 11, 1995, is reversed and the claimant is denied benefits against the respondent and its insurance carrier for an alleged injury occurring from October 4, 1994 through January 6, 1995.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

C: Robert R. Lee, Wichita, Kansas  
Clifford K. Stubbs, Lenexa, Kansas  
John D. Clark, Administrative Law Judge  
David A. Shufelt, Acting Director